TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 555.

MARSHALL B. BLAKE, COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

vs.

THE NATIONAL PARK BANK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 6, 1874.

In the Supreme Court of the United States.

M. B. BLAKE, COLLECTOR, &c.,
vs.
THE NATIONAL PARK BANK.
No. 555.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for the collector.

This was an action of assumpsit, brought by the bank against the collector, to recover the amount which he had compelled it to pay as a tax of 2½ per cent. upon (1) a dividend of earnings ($123,076.92) declared December 16, 1870, payable December 27, 1870, out of earnings for the last six months of 1870, and (2) a sum ($26,720.40) earned during such last six months, paid (December 16, 1870) to the receiver, &c., as taxes due to the city, county, and State of New York, on behalf of the stockholders, which sum, if not so paid, would have gone to increase the above dividend.

Judgment having been recovered by the bank, the collector brought this writ of error.

We assign for error the ruling of the court that no tax was due the United States upon the items mentioned above.

For an argument we refer to our brief in the case of Kinney against the Philadelphia and Reading Railroad Company, ordered to be heard in connection with this case.

GEORGE H. WILLIAMS,
Attorney-General.
S. F. PHILLIPS,
Solicitor-General.

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INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate	2	1
Declaration	5	2
Joinder	16	5
Agreed statement of facts	17	5
Judgment	21	6
Bill of exceptions	23	6
Assignment of error	32	14
Joinder in error	34	14
Citation	36	14

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you or some of you, between the National Park Bank and Marshall B. Blake, a manifest error hath happened, to the great damage of the said Marshall B. Blake, defendant, as is said and as appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the 2d Monday of October, 1874, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 23d day of September, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

2 (Indorsed:) U. S. Supreme Court. Marshall B. Blake, plff. in error, *vs.* The National Park Bank, deft. in error. Writ of error. George Bliss, atty. for plff. in error. Fil'd Sept. 25, 1874.

Within writ is hereby allowed.
Sept. 23d, 1874.

SAML. BLATCHFORD, *D. J.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United
3 States for the southern district of New York, second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from one to thirty-four inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Marshall B. Blake, plaintiff in error, against the National Park Bank, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 26th day of September, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the said United States the ninety-ninth.

[SEAL.] KENNETH G. WHITE, *Clerk.*

4 Circuit court of the United States for the southern district of New York.

THE NATIONAL PARK BANK OF NEW YORK, plaintiff,
vs.
MARSHAL B. BLAKE, DEFENDANT.

Pleas before the judge of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court building, No. 41 Chambers street, in the city of New York, of the term of October, 1873, to wit, of the 7th day of February, in the year of our Lord one thousand eight hundred and seventy-four.

Witness the honorable Lewis B. Woodruff, judge of the said court.
KENNETH G. WHITE, *Clerk.*

5 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, on the 25th day of September, 1872, in April term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court building, No. 41 Chambers street, in the city of New York, in the said district, before the judge of the said court, came The National Park Bank, of New York, by Francis C. Barlow, its attorney, and brought then and there into the said court, before the judge thereof, its certain declaration against Marshal B. Blake, (being in custody, &c.) of a p ea of trespass on the case upon promises, which said declaration follows in these words, that is to say:

Circuit court of the United States for the southern district of New York, in the second circuit.

THE NATIONAL PARK BANK OF NEW YORK, plaintiff,
vs.
MARSHAL B. BLAKE, DEFENDANT.

6 SOUTHERN DISTRICT OF NEW YORK, *ss:*

The plaintiffs, by Francis C. Barlow, their attorney, come here into court, and suggest and give the court now here to understand and be informed that heretofore, to wit, on the first day of April, A. D. 1872, a suit was duly commenced in the supreme court of the State of New York, in the county of New York, by the plaintiffs above named, against the defendant herein, by summons upon and for the same cause of action hereinafter set forth.

That the said defendant afterwards duly appeared in said suit, by Noah Davis, esq., his attorney, and such proceedings were had thereupon that afterwards, to wit, on the 8th day of April, 1872, said suit was duly removed by writ of certiorari to this court, agreeably to the provisions of the statute in such case made and provided.

That upon the removal of such suit, it is made to appear to this court that no copy of the record and proceedings therein in said supreme court can be obtained, which allegations and suggestions the defendant does not deny, but admits the same to be true.

Wherefore let the plaintiffs proceed de novo and file a declaration

7 of their cause of action, and let the parties thereupon proceed as in an action originally brought in this court.

And the plaintiffs, now, according to law, by their attorney aforesaid, complain of the defendant herein in a plea of trespass on the case upon promises—

For that whereas the said plaintiffs at all the times hereinafter mentioned, to wit, from the first day of July, 1870, up to the present time, were, and still are, a body corporate or bank incorporated and existing for the purpose of carrying on the business of banking under and by virtue of a law of the Congress of the United States passed June 3d, 1864, and entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof."

And such association or corporation was and is located in the city, county, and State of New York, in the thirty-second collection-district of said State, and therein carried on said business of banking, and had power and capacity to sue by the name of The National Park Bank of New York.

8 And whereas, on the 16th day of December, 1870, the said plaintiffs declared a dividend of $123,076.92 from its earnings, income, and gains, which dividend was, by the terms of its declaration, made payable to stockholders on the 27th day of December, 1870, and accrued and was declared and paid out of the earnings, income, and gains of the plaintiffs for the six months beginning on the first day of July, 1870, out of which last mentioned sum, $102,564.10, part thereof, accrued and was declared, and paid out of the earnings, gains, and profits which accrued and were earned in the last five months of 1870.

And whereas said dividend was, on and after the 27th day of December, 1870, paid by the plaintiffs to the several stockholders entitled to the same, and neither the tax of two and a half per centum hereinafter mentioned, nor any other tax whatsoever, was deducted or withheld by said plaintiffs from said dividend, or the payment thereof.

And whereas on the 16th day of December, 1870, the plaintiffs paid to the proper officer, to wit, the receiver of taxes of the city of New York, the sum of $26,720.40 as and for the city, county, and

9 State taxes of the city, county, and State of New York, imposed by law upon the shares of the stock of the plaintiffs' bank, held by the stockholders thereof, and which payment was made for the account and behalf of the stockholders of the plaintiffs, and would have been, if it had not been paid as taxes as aforesaid, divided as a dividend to said stockholders in addition to the dividend above mentioned, of which said sum of $26,720.40, so as aforesaid paid as city, county, and State taxes, the sum of $23,643.48, part thereof, was so paid by the plaintiffs out of the gains, income, and profits of the plaintiffs which accrued and were earned in and during the last six months of 1870, and of which $19,702.90, part thereof, was so paid by the plaintiffs out of the gains, income, and profits of the plaintiffs which accrued and were earned in and during the last five months of 1870.

And whereas, also, the assessor of the internal revenue of the United States in and for the said thirty-second collection district of New York did afterwards, to wit, on the 15th day of June, 1871, under a

10 false and illegal claim that a tax of two and one-half per cent. was by law due to the Government of the United States upon the amount of said dividends and said sum of $26,720.40, paid as aforesaid for city, county, and State taxes, assess an erroneous and illegal tax against the plaintiffs of two and one-half per cent. upon the amount of said dividend, and said sum of $26,720.40, to wit, the sum of $3,591.09, (being

the said tax, of two and one-half per cent.) less the sum of $153.84, which was legally deductable & deducted therefrom, when in truth and fact the said plaintiffs were exempt from any taxation upon such dividend, & said sum of $26,720.40, and said plaintiffs then & there protested against said assessment and against the payment of any such erroneous & illegal taxes, or any part thereof.

And whereas, also, during the time aforesaid, and at the time of the payment hereinafter mentioned, the defendant held the office and performed the duties of collector of internal revenue, in and for the said thirty-second collection district of New York, and on or about the 30th day of June, 1871, as such collector, demanded of the said plain-
11 tiffs the payment of the said tax so illegally and erroneously assessed as aforesaid, and they, the said plaintiffs, were compelled to, and did, on the 30th day of June, 1871, pay to the defendant as such collector under the protest and duress, and by compulsion, the said erroneous and illegal taxes, to wit, the sum of $3,591.09, which sum the said defendant, as such collector as aforesaid, received and collected from the said plaintiffs in the manner aforesaid.

And whereas, also, on or about the 10th day of July, 1871, the said plaintiffs, according to the provisions of law in that behalf and the regulations made by the Secretary of the Treasury in pursuance thereof, made an appeal to the Commissioner of Internal Revenue from the said erroneous and illegal assessments upon and collections from the said plaintiffs of the aforesaid erroneous taxes, by which said appeal the said plaintiffs did claim and demand that the said Commissioner of Internal Revenue should remit and refund to the said plaintiffs the said sum of money so paid by the said plaintiffs to the said defend-
12 ant as aforesaid as and for the said erroneous and illegal taxes aforesaid.

And whereas the said Commissioner of Internal Revenue then and there entertained said appeal, and on or about the second day of October, 1871, decided the same adversely to said plaintiffs, and this action is now brought by the said plaintiffs, within six months from the time of said decision, by the said Commissioner upon said appeal, by means of which several promises the said defendant then and there became liable to pay back to the said plaintiffs the said sum of money, together with the lawful interest thereon from the time of the payment thereof to the said defendant, as above mentioned; and being so liable, the defendant, in consideration thereof, heretofore, to wit, on the first day of July, 1871, at New York, in said district, undertook, and then and there faithfully promised the said plaintiffs, to pay them the said last-mentioned sum of $3,591.09, with interest as aforesaid, when he, the said defendant, should be thereunto afterwards requested; yet the said
13 defendant, although often requested, the same has not paid, but to pay the same or any part thereof to the said plaintiffs the said defendant hath hitherto altogether refused, and doth still refuse, to the damage of the plaintiffs of $5,000.

And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, being then and there collector of internal revenue for the thirty-second collection district of New York, was indebted to the said plaintiffs in the sum of $3,591.09, lawful money of the United States of America, for money before that time lent and advanced by said plaintiffs to the said defendant, at the special instance and request of him, the said defendant; and for other moneys by said plaintiffs before that time paid, laid out, and expended for the said defendant, at the special instance and request of him, the said

defendant; and for other moneys, by the said defendant, before that time had and received to the use of the said plaintiffs.

14 And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place last aforesaid, undertook and faithfully promised the said plaintiffs well and truly to pay to the said plaintiffs the said sum of money in this count mentioned when the said defendant should be afterwards thereunto requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place last aforesaid, accounted together with the said plaintiffs of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiffs in the further sum of $3,591.09, lawful money of the United States; and being so indebted, the said defendant in consideration thereof, afterwards, to wit, on the same day and

15 year, and at the place last aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned, when the said defendant should be thereunto requested.

Nevertheless the said defendant (though often requested, &c.) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the said sums or any part thereof has hitherto wholly refused and doth still refuse, to the damage of the said plaintiffs of five thousand dollars, and therefore the plaintiffs bring this suit, &c.

16 And the said Marshal B. Blake, defendant in this suit, by Noah Davis, esq., United States district attorney, his attorney, comes and defends the wrong and injury, when, &c., and says, that he did not undertake and promise, in manner and form, as the said plaintiffs in this suit have above thereof declared against the said defendant, and of this he puts himself upon the country, and the said plaintiffs do the like, &c.

Therefore, the issue above joined is ordered by the said court to be tried at the term of the said court appointed to be held at the city of New York, on the third Monday of October, 1872.

Afterwards, that is to say, on the day and at the place before mentioned, before the judge of the said court, came as well the above-named plaintiff as the above-named defendant, by their respective attorneys aforesaid, but the said cause was not tried, but continued from term to term, to the 7th day of February, 1874, at which time and at the place before mentioned, before the judge of the said court, came as

17 well the above-named plaintiff as the above-named defendant, by their respective attorneys aforesaid.

And the respective parties did then and there waive a trial by jury in open court, and filed a stipulation in writing to that effect, and thereupon agreed, in writing, upon the facts in the above cause in the words following, to wit:

U. S. circuit court southern district of New York.

THE NATIONAL PARK BANK OF NEW YORK, plaintiffs,
vs.
MARSHALL B. BLAKE, DEFENDANT.

For the purposes of the trial of this action the following facts are agreed upon:

That the allegations of the declaration down to the words "And whereas, on the 16th day of December, 1870, the said plaintiffs declared a dividend," are true.

18 That on the 16th day of December, 1870, the plaintiffs declared a dividend of $123,076\frac{92}{100}$ from their earnings, income, and gains. And that said dividend was, by the terms of its declaration, made payable to stockholders on the 27th day of December, 1870, and was, prior to the assessment hereinafter mentioned, paid to the several shareholders entitled to receive the same; and that neither the tax of two and one-half per cent. hereinafter mentioned nor any other tax whatsoever was deducted or withheld by said plaintiffs from said dividend, or the payment thereof to stockholders. said earnings, income, and gains accrued during the period from July 1st, 1870, to December 31st, inclusive.

That on the 16th day of December, 1870, the plaintiffs paid to the receiver of taxes, of the city and county of New York, the sum of $26,720.40, as and for the city, county, and State tax, of the city, county, and State of New York, all imposed by law upon the shares of the stock of the plaintiffs' bank held by the stockholders thereof,

19 which payment was made for the account and behalf of the stockholders of the plaintiffs, and which amount, unless so paid as taxes, would have been paid to stockholders as a part of said dividend declared on Dec. 16th, 1870. Said taxes were paid with money taken from the individual profits which accrued and were earned during the period from July 1st to December 31st, 1870. That the assessor of internal revenue of United States, in and for the 32nd collection district of the State of New York, did, on the 20th day of June, 1871, assess against the plaintiffs a tax of two and one-half per cent. on the several foregoing amounts of $123,076.92 and $26,720.40, the aggregate of which amounts of taxes so assessed was $3,591.09.

That on said June 20th, 1871, and ever since that time, the defendant held, and now holds, the office of collector of internal revenue of the United States in and for the 32d collection district of the State of New York, and then performed and now performs the duties of said office.

20 That on the 30th day of June, 1871, the defendant as such collector demanded from the plaintiffs the payment of said taxes so assessed as aforesaid, amounting to said sum of $3,591.09; and that on said June 30th, 1871, the plaintiffs were compelled to, and did under protest, pay said sum to the defendant as such collector, and the defendant received the same.

That on the 10th day of July, 1871, the plaintiffs, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury in pursuance thereof, made an appeal to the Commissioner of Internal Revenue from the aforesaid assessment and collection, in and by which appeal the plaintiffs demanded that the said sum of $3,591.09, so assessed and collected as aforesaid, should be refunded to the plaintiffs.

That on the 2d day of October, 1871, the said Commissioner of Internal Revenue decided said appeal adversely to said plaintiffs; and that this action was brought by the plaintiffs within six months from the date of said decision upon said appeal.

Dec. 18, 1873.

GEORGE BLISS,
U. S. Atty.

21 And the said cause being then and there argued by the said attorneys for the respective parties, and the court having taken

the same under advisement, the said judge of said circuit court finds that the said defendant did undertake and promise in manner and form as the said plaintiff hath above complained against him, and assesses the damages of the said plaintiff by reason of the premises over and above its costs and charges by it about its suit in this behalf expended, to the amount $4,362.42 *dollars*, the amount claimed in the declaration, with interest to date added.

Therefore it is considered that the said plaintiff do recover against the said defendant his said damages, costs, and charges by the judge aforesaid assessed, and also seventy-six & $\frac{53}{100}$ dollars for his costs and charges by the court here adjudged of increase to the said plaintiff with its assent, which said damages, costs, and charges, in the whole, amount to forty-four hundred & thirty-eight & $\frac{95}{100}$ dollars.

$4,438.95.

And said defendant in mercy, &c.

Judgment signed this 22d day of September, 1874.

R. E. STILWELL,
Dep. Clerk.

22 (Endorsed:) U. S. circuit court. National Park Bank vs. Marshall B. Blake. Judgment record. Francis C. Barlow, plff.'s atty. Debt, —; costs, —; total, $—. Filed Sept. 22d, 1874.

23 U. S. circuit court.

THE NATIONAL PARK BANK OF NEW YORK
v.
MARSHAL B. BLAKE. } Bill of exceptions.

This cause came on for trial at the October term of the United States circuit court for the southern district of New York, in the second circuit, to wit, on the 7th day of February, in the year 1874, in said term, before the honorable Nathaniel Shipman, judge, a jury having been duly waived by the respective parties pursuant to the act of Congress.

Plaintiff's counsel then reads the following agreed statement of facts, viz: "That the allegations of the declaration down to the words 'and whereas on the 16th day of December, 1870, the said plaintiff declared a dividend,'" are true.

That on the 16th day of December, 1870, the plaintiffs declared a dividend of $123,076.92½ from their earnings, income and gains, and that said dividend was by the terms of its declaration made payable to stockholders on the 27th day of December, 1870, and was prior to the assessment hereinafter mentioned paid to the several shareholders entitled to receive the same, and that neither the tax of two and one-half per cent. hereinafter mentioned, nor any other tax whatsoever, was deducted or withheld by said plaintiffs from said dividend or the payment thereof to stockholders. Said earnings, income, and gains accrued during the period from July 1st, 1870, to December 31st, 1870, inclusive.

24 That on the 16th day of December, 1870, the plaintiffs paid to the receiver of taxes of the city and county of New York the sum of $26,720.40, as and for the taxes of the city, county, and State of New York all imposed by law upon the shares of the stock of the plaintiff's bank, held by the stockholders thereof, which payment was, made for the account and behalf of the stockholders of the plaintiffs, and which amount unless so paid as taxes would have been paid to stockholders as a part of said dividend declared on December 16th,

1870. Said taxes were paid with money taken from the undivided profits which accrued and were earned, during the period from July 1st to December 31st, 1870. That the assessor of internal revenue of the United States in and for the thirty-second collection-district of the State of New York did, on the 20th day of June, 1871, assess against the plaintiffs a tax of two and one-half per cent. on the several foregoing amounts of $123,076.92 and $26,720.40, the aggregate of which amounts of taxes so assessed was $3,591.09.

That on said June 20, 1871, and ever since that time, the defendant held and now holds the office of collector of internal revenue of the United States in and for the thirty-second collection-district of the State of New York, and then performed and now performs the duties of said office.

That on the 30th day of June, 1871, the defendant as such collector demanded from the plaintiffs the payments of said taxes so assessed as aforesaid, amounting to said sum of $3,591.09, and that on said June 30th, 1871, the plaintiffs were compelled to, and did under protest, pay said sum to the defendant as such collector, and the defendant received the same.

That on the 10th day of July, 1871, the plaintiffs, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury in pursuance thereof, made an appeal to the Commissioner of Internal Revenue from the aforesaid assessment and collection, in and by which appeal the plaintiffs demanded that the said sum of $3,591.09, so assessed and collected as aforesaid, should be refunded to the plaintiffs.

That on the 2d of October, 1871, the said Commissioner of Internal Revenue decided said appeal adversely to said plaintiffs, and that this action was brought by the plaintiffs within six months from the date of said decision upon said appeal.

The foregoing comprises all the evidence adduced upon the trial, and thereupon defendant's counsel moved the court that judgment be entered for defendant, and plaintiff's counsel moved that judgment be entered for plaintiff.

After argument and due deliberation, the court denied the said motion of defendant's counsel, and defendant's counsel duly *accepted* thereto.

The court then directed that judgment be entered for the
25 plaintiffs, to which direction, and to the conclusion of law of the court upon the foregoing facts as hereinafter set forth, defendant's counsel duly excepted.

The decision of the court refusing judgment for defendant, and directing judgment for plaintiff, and filed by the court upon the conclusion of said trial, is as follows:

SHIPMAN, J.:

This action was tried before the court, a jury having been waived by written stipulation of the parties.

The following statement of facts was agreed by the parties and is found by the court to be true.

(The statement of facts here referred to is the same as that set forth above.)

26 The claim of the plaintiffs is, that under the act of July 14th, 1870, (U. S. Stat. at Large, vol. 16, p. 256,) dividends of earnings, income, or gains, which were declared by banks during the last five months of the year 1870, are not taxable.

The decision of the case depends upon the proper construction to be given to section 15 of said act, (U. S. Stat. at Large, vol. 16, p. 260.) The material portions of this section are as follows: "That there shall be levied and collected for and during the year eighteen hundred and seventy-one, a tax of two and one-half per centum on the amount of all interest or coupons paid on bonds, or other evidences of debt issued and payable in one or more years after date, by any of the corporations in this section hereinafter enumerated, and on the amount of all dividends of earnings, income, or gains, hereafter declared by any bank, trust company, savings institution, insurance company, railroad company, canal company, turnpike company, canal navigation company, and slack-water company, whenever and wherever the same shall be payable, and to whatsoever person the same may be due, including non-residents, whether citizens or aliens, and on all undivided profits of any such corporation which have accrued and been earned, and added to any surplus, contingent or other fund, and every such corporation having paid the tax as aforesaid, is hereby authorized to deduct and withhold from any payment on account of interest, coupons, and dividends, an amount equal to the tax of two and one-half per centum on the same."

The controversy in regard to the true interpretation of this section arises upon the construction to be given to the clause "that there shall be levied and collected for and during the year 1871," in connection with the words "hereafter declared." On the one part it is contended that the statute is to be construed as follows: "That there shall be levied and collected a tax of two and one-half per centum upon all dividends hereafter declared for and during the year 1871;" that the words "for and during the year 1871," limit the tax to dividends declared upon the business of and during that year. The construction of the defendants is, "that the tax upon all dividends hereafter declared shall be levied and collected for and during the year 1871," and that these words refer to the time when the tax is levied, or assessed and collected.

It is to be observed, as stated by Judge Lowell, of Massachusetts, in the decision of the Metropolitan Railroad Company vs. Chas. W. Slack, delivered May 1, 1874, but not yet reported, "that the words 'for and during the year 1871,' were inserted upon the report of a committee of conference, and without a word of debate in either House." As the section stood before the insertion of these words, it is obvious that the meaning of this part of the statute was to impose a continuing tax of two and one-half per cent. upon all dividends thereafter declared, without limitation as to the duration of the tax. The addition of the words "for and during the year 1871," creates the difficulty in determining the construction of the section as amended, for it is evident that these words were not inserted without an object, and if the object was
27 to specify the time and to limit the period within which future dividends should be taxable, then the word "hereafter" is superfluous. If, on the other hand, "hereafter" is to retain the force which it had before the section was amended, the scope and meaning of the amendment is not apparent.

To aid in ascertaining the object and purpose of the words which were thus added, and the intent of the whole section, it may be useful to understand the condition of the congressional legislation upon the subject of taxes upon dividends prior to the passage of this act.

By the 119th section of the act of June 30, 1864, (13 U. S. Stat. at Large, p. 283,) as amended by the 13th section of the act of March 2, 1867, (14 U. S. Stat. at Large, 480,) it was provided that the duties on incomes should "be levied on the first day of March, and be due and

payable on or before the 30th day of April in each year, until and including the year 1870, and no longer." The annual income tax imposed by that act was five per cent. The 120th section of the same act, (ubi supra, p. 283,) as amended by the 9th section of the act of July 13, 1866, (14 U. S. Stat. at Large, 138,) provided that there should be levied and collected a duty of five per centum per annum upon all dividends declared due to stockholders as part of the earnings of the corporations therein specified, and such corporations were required to pay the duty to the proper officer, and to deduct and withhold the tax from the amount paid to stockholders on account of their dividends.

This dividend tax was, though a part of the general system established by Congress for the taxation of incomes, in form a tax upon the corporations, inasmuch as it was imposed directly upon the dividends and payment was required of the corporation, which was also directed to make due returns of such dividends to the proper officer. It was a tax in substance upon the shareholder, inasmuch as it was deducted from his dividends by the corporation, and as was held in Stockdale v. Atlantic Insurance Company, (19 Internal-Revenue Record, p. 169,) "the effect of such a tax on the shareholder is the same, whether it be considered a tax on his share for the dividend earned by his share, or on the corporation on account of said earnings. And it is the same, whether the tax is imposed on the undivided earnings or on those earnings after they have been divided. He, in any and all these cases, in point of fact ultimately suffers to that extent, or loses the amount of the tax." But it was held by the law-officers of the Government that the limit upon the duration of the income tax which was prescribed by the 119th section of the act of June 30, 1864, as amended, did not apply to corporation taxes, and consequently payment of the tax upon dividends declared in 1870 was exacted prior to the passage of this act.

This, then, was the subject-matter upon which Congress was called to legislate during the session at which the act of July 14, 1870, was passed. The income tax for the year 1869 was due April 30, 1870, and the tax ceased thereafter. No income tax for the year 1870 had been imposed. The tax upon dividends was still being collected from unwilling corporations. The act of 1870 was "designed to recast the internal-revenue laws, to repeal some taxes, modify others, and declare the re-enactment or continuance of others for a limited time, and this was especially true of the class of taxes embraced under the general head of income taxes of all kinds." Stockdale v. Atlantic Insurance Company, (19 Int. Rev. Rec., 169.) The 17th section declared that the dividend tax of the act of June 30, 1864, should not be levied or assessed after August 1, 1870. The 6th section established an income tax of two and one-half per centum annually upon incomes for the years 1870 and 1871, and no longer. The dividend tax for the future was established by the 15th section.

The conclusion at which I have arrived from an examination of
28 the statute and the history of legislation on the subject is that the 15th section made taxable those dividends which were declared for the earnings of the year 1871, and also those which were declared during that year, and limited the tax to those dividends only, and that the tax was to be imposed upon the dividends for that year, and also upon all dividends declared during the year 1871, and was thereafter to cease.

1st. Such a construction is manifest from a comparison of the language and intent of the 6th section of the act of July 14, 1870, with the lunguage and apparent intent of the 15th section.

The text of the material part of the 6th section is as follows: "That there shall be levied and collected annually, as hereinafter provided, for the years eighteen hundred and seventy and eighteen hundred and seventy-one, and no longer, a tax of two and one-half per centum upon the gains, profits, and income of every person residing in the United States, and of every citizen of the United States residing abroad derived from any source whatever, whether within or without the United States, except as hereafter provided."

The obvious meaning of this language is that there shall be collected a tax upon the income of every person for the years 1870 and 1871, and not thereafter. The tax is upon the income accruing in the specified year; no one has ever contended that the income tax for the years 1870 and 1871 was to be collected in those years respectively. The return of the taxpayer for each year ending December 31 were not made until the following March, and the payment of the tax was not made until the succeeding month. The tax upon the income of 1871 was collected April 30, 1872. When the 15th section provided that there shall be levied and collected for and during the year 1871 a tax on the amount of dividends hereafter declared, as the 6th section specified the years during which taxable incomes were to accrue, the 15th section specified the particular year during which taxable dividends were to be earned, and each section provided a limitation of time beyond which the respective taxes were not to be imposed. The object of Congress was to determine not only the duration of these two prominent classes of taxes, but also the years when or "for" which the assessable dividends and incomes were to accrue. The statute therefor' continued the income tax for ten years at the reduced rate of two and one-half per cent. It declared how long the dividend tax should continue, by the words "during the year 1871," analogous to the "and no longer" of the 6th section. And it also specified the year in which the taxed dividends were to be earned by the word "for," the same word which was used in the 6th section with reference to the years during which incomes were to bear this burden.

But if the incomes of the entire years 1870 and 1871 were taxed, why was the dividend tax confined to the year 1871, and not extended to the dividends of the last five months of 1870? The answer may be, that there was a natural relation and connection between the two classes of taxes; each practically upon the income of the citizen. A tax of two and a half per cent. was now imposed upon incomes of 1870 and 1871, but dividends had already paid, and were to pay until August 1, 1870, a tax of five per cent. Congress may have thought proper not to impose a tax directly upon corporations for the residue of the year, but that it should be continued thereafter at the same rate and for the same period with the tax upon incomes.

It may be claimed that the object of the words "for and during the year 1871" was simply to limit the time within which the dividend was to be declared; that the statute would then mean "there should be a tax upon all dividends hereafter declared, and during or until the end of 1871." But such a construction would have invited an evasion of the tax, for if the limitation was simply one of time within which the dividends were to be declared, an easy method of avoiding the tax
29 would have been to postpone the dividend. The word "for" is one of importance. It prevented any evasion by providing that a tax was to be paid upon all dividends declared "for"—that is, upon the earnings of 1871; and furthermore it specified the particular year whose dividends were taxable, in the same manner that the 6th section

provided that the income tax was to be paid upon incomes for the years 1870 and 1871. The section, as thus construed, prevented any evasion either prior to or after the year 1871. Barnes v. The Railroad Co., 17 Wall., 294. It is apparent from the opinion of the court in these cases that the words "during the year 1871" did not limit the taxability of dividends to those which were declared during that year. If they were earned during the year they were taxable whenever declared; and, in addition, all dividends which were in fact declared during the year were taxable. Thus all corporations which either declared or earned dividends during the year 1871 were liable to pay a tax.

2d. The construction claimed by the defendant compels the collection of the taxes upon the dividends of 1871, as well as those of the last five months of 1870, within the year 1871; a construction which is in violation of the other provisions of the statute.

By the 16th section, the officers of the corporation declaring the dividend were required to make and render to the proper assessor a return of the dividend on or before the tenth day of the month following that in which it became due. No return of a dividend declared or payable in December, 1871, was required to be made until January, 1872. If declared in December, 1871, for the earnings of that year, but not payable till January, 1872, the return is not to be made till February, 1872. The returns are sent to the collector within thirty days, (sec. 18 act of June 30, 1864,) (13 U S. Stats. at Large, p. 328,) and the taxes are collected within ten days thereafter. (Sec. 28 same act, ubi supra, p. 232.) Thus the dividends payable in December, 1871, would not be collected before February, 1872. It is hardly possible to suppose that the 15th section intended, in violation of the spirit of the 16th section, and of the other provisions of law, to require that the taxes upon all dividends of 1871 should be paid in that year, or that those dividends only of 1871 were taxable upon which a tax could legally be collected within the year. Neither is it to be supposed that it was the intention of Congress to postpone the payment of the taxes upon the dividends of 1870 to the succeeding year, when by the course of business and the requirements of law these taxes had always been paid within a period of about two months from the time of the payment of the dividends.

3d. This construction is in accordance with the natural and ordinary meaning of the words of the section.

This point is stated by McKenna, circuit judge, in Philadelphia and Reading R. R. v. Kenney, (18 Int. Rev. Record, p. 92,) as follows: "The word 'levied' in the beginning of the section is evidently employed as convertible with assessed or imposed, so that the import of the enactment is, that interest, dividends, and surplus earnings shall be subjected to a tax of two and one-half per cent. for and during the year 1871. The plainly-expressed meaning of the section would therefore seem to be that the tax to be levied was a tax for the year 1871, and not for the whole or any part of any previous year, and it was to be imposed upon the enumerated subjects, during and within the year 1871, and not during or within any other year. Interpreting the words of the section, then, according to their ordinary sense, interest falling due, and dividends declared and payable, within the last five months of 1870, were excluded from the operation of the tax."

It is noteworthy that the word "hereafter" is not employed in connection with the interest or coupons, which are also subject to tax. The object of using the word hereafter in connection with dividends only, was, as the section was at first drawn, to make it manifest that the two and one half per cent. tax was not retro-

active, but that dividends declared prior to August 1, 1870, were to pay the larger tax. When the words "for and during the year 1871" were added, it became plain that no retroactive operation of the statute was intended, and the word "hereafter" lost its peculiar force; and the year during which the dividends were to be earned became the main text of taxability. As tersely remarked by Judge Lowell, in Metropolitan R. R. Co. v. Slack, heretofore cited, "the point which in reality is the gist of the case is that it is not the declaration of a dividend, but the earning of profits that is the material thing, and that it is upon the profits earned in 1871 that the tax is imposed, and on none other." It seems to me that those dividends also which were declared in 1871, were taxable, although not declared exclusively from the earnings of that year.

If the word "hereafter" is to be the governing word of the section, then the clause inserted by the amendment of which I have spoken, becomes either repugnant to the word "hereafter," or else is to be construed in such a manner as to be self-contradictory, and inconsistent with the other provisions of the statute. If, on the other hand, the clause "for and during the year 1871," is the governing clause, then the sections of the statute become harmonious, each with the other, and the word "hereafter," while losing any especial force, is not repugnant with the remainder of the section, but becomes merely needless. The latter construction seems to me to be less violent and strained than the other, and to give each part of the section its due and weight, and also to be most in accordance with the general object of the statute, and intent of the legislature.

Inasmuch as the dividends of the plaintiffs were declared upon the earnings of the preceding six months, commencing July 1, 1870, and although the 17th section of the act of July 14, 1870, repealed corporation taxes after August 1, 1870, inasmuch as all rights, which had already accrued, or might accrue after July 14, 1870, were saved, it may be claimed that a five per cent. tax was due upon the earnings for one month prior to August 1. But no right had accrued or was accruing to tax a dividend, until it was declared, or to tax undistributed earnings, until they had been added to the surplus, unless such declaration or addition was "omitted or neglected for more than six months." It was the fund which accrued within the six months which Congress intended to tax. Barnes v. The Railroad Company, 17 Wall., 309. At the time when that fund accrued, the tax had been repealed.

Let judgment be entered for the amount of taxes paid upon the dividends and surplus earnings specified in the statement of facts, with interest from the dates of payment.

Francis C. Barlow, for the plaintiff. George Bliss, U. S. attorney, for defendant.

And inasmuch as the aforesaid several matters of fact and of
31 law do not appear by the record of said trial and judgment, therefore on the prayer of the said defendant, by his counsel, the said judge has signed and sealed this bill of exceptions this 19th day of September, in the year 1874, as yet of the October term of the said circuit court as aforesaid.

N. SHIPMAN, [L. S.]
Judge.

(Endorsed:) The National Park Bank of New York vs. Marshal B. Blake, collector, &c. Bill of exceptions. George Bliss, deft.'s atty. Filed Sept. 21, 1874.

32 U. S. circuit court.

THE NATIONAL PARK BANK OF NEW YORK
vs.
MARSHALL B. BLAKE. } Assignment of error.

And now the said Marshall B. Blake, by George Bliss, his attorney, says that in the record and proceedings aforesaid there is manifest error, in this, to wit, that, by the said record aforesaid, it appears that the judgment aforesaid was given for the said The National Park Bank of New York against the said Marshall B. Blake, whereas by the law of the land the said judgment ought to have been given for said Marshall B. Blake against the said The National Park Bank of New York. And the said Marshall B. Blake prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he has lost by reason of the said judgment.

GEORGE BLISS,
Atty. for Plff. in Error.

33 (Endorsed:) U. S. circuit court. The National Park Bank of New York vs. Marshall B. Blake. Assignment of error. George Bliss, deft.'s atty.

Due service copy within assignment error is hereby admitted. Sept. 24, '74.

FRANCIS C. BARLOW,
Plff.'s Atty.

Filed Sept. 25, 1874.

34 U. S. Supreme Court.

MARSHALL B. BLAKE, PLAINTIFF IN ERROR,
vs.
THE NATIONAL PARK BANK OF NEW YORK,
defendants in error.

And afterwards, to wit, on the 25th day of September, 1874, in the said October term of the year A. D. 1873, the said The National Park Bank of New York, by Charles C. Beaman, jr., their attorney, freely come here into court and say that there is no error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid, and they pray that the Supreme Court of the United States may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

CHARLES C. BEAMAN, JR.,
Attorney for Defendant in Error.

35 (Endorsed:) U. S. Supreme Court. Marshall B. Blake, plff. in error, vs. The National Park Bank of New York, defts. in error. Joinder in error. Charles C. Beaman, jr., atty. for defts. in error. Filed Sept. 26, 1874.

36 United States of America to the National Park Bank of New York, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second

Monday of October, 1874, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Marshal B. Blake, collector of internal revenue, &c., is plaintiff in error, and you are the defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the hon'ble Samuel Blatchford, one of the judges of the circuit court of the United States for the southern district of New York, this 23d day of September, in the year one thousand eight hundred and seventy-four.

SAM'L BLATCHFORD.

37 (Indorsed:) U. S. Supreme Court. Marshall B. Blake, plff. in error, vs. The National Park Bank, deft. in error. Citation. George Bliss, attorney for plff. in error.

Due service copy within citation is admitted.
Sept. 24, '74.

FRANCIS C. BARLOW,
Atty. for Defts. in Error.

Filed Sept. 25, 1874.

(Indorsement on cover:) No. 555. S. New York, C. C. U. S. Marshall B. Blake, collector of internal revenue, plaintiff in error, vs. The National Park Bank. Filed 6 October, 1874.

IN THE

Supreme Court of the United States.

No. 553.

MARSHALL B. BLAKE, COLLECTOR OF INTERNAL REVENUE,
Plaintiff in Error and Defendant below,
vs.
THE NATIONAL CITY BANK OF NEW YORK,
Defendant in Error and Plaintiff below.

No. 554.

THE SAME,
Plaintiff in Error and Defendant below,
vs.
THE FOURTH NATIONAL BANK,
Defendant in Error and Plaintiff below.

No. 555.

THE SAME,
Plaintiff in Error and Defendant below,
vs.
THE NATIONAL PARK BANK OF NEW YORK,
Defendant in Error and Plaintiff below.

Error to the Circuit Court of the United States for the Southern District of New York.

NEW YORK:
EVENING POST STEAM PRESSES, 41 NASSAU ST., COR. LIBERTY.

1875.

In the Supreme Court

OF THE UNITED STATES.

MARSHALL B. BLAKE, Collector of Internal Revenue,
Plaintiff in Error and Defendant below.

No. 553.

vs.

THE NATIONAL CITY BANK OF NEW YORK,
Defendant in Error and Plaintiff below.

THE SAME,
Plaintiff in Error and Defendant below.

No. 554.

vs.

THE FOURTH NATIONAL BANK,
Defendant in Error and Plaintiff below.

THE SAME,
Plaintiff in Error and Defendant below.

No. 555.

vs.

THE NATIONAL PARK BANK OF NEW YORK,
Defendant in Error and Plaintiff below.

Error to the Circuit Court of the United States for the Southern District of New York.

Brief of Defendants in Error.

Statement of Case.

The plaintiff in error in these three cases brings error to the Circuit Court of the United States for the Southern District of New York, to procure the reversal of judgments rendered against him in suits brought by the defendants in error to recover certain internal revenue taxes alleged to have been illegally assessed and collected.

The taxes in question were upon dividends declared and amounts added to surplus in the last five months of the year 1870, and are claimed by the above named banks to be free from taxation. The Circuit Court, on a trial in which a jury was waived, gave judgment for the plaintiffs below.

The cases were tried on the 7th day of February, 1874, and judgment signed on September 22d, 1874. The defendant below brings the records here by writ of error.

There is a general assignment of error in each case. As all the three cases involve but one and the same question of law, but one brief is prepared in them.

The facts of the cases vary as follows:

The Park Bank declared a dividend in December, 1870, and also paid State and municipal taxes out of earnings, which otherwise would have been divided. It made no addition to surplus.

The Fourth National Bank declared a dividend in December, 1870, and paid State and municipal taxes as aforesaid, and likewise made an addition to surplus.

The City Bank declared a dividend and paid its State and municipal taxes and made an addition to surplus on November 1st, 1870, and also declared another dividend and made a further addition to surplus on May 1st, 1871.

We believed, and argued below, that the payments and additions of November 1st, 1870, were wholly ex-

empt, and that those of May 1st, 1871, were wholly taxable; but there being a possibility of the courts holding that the part of the dividend and addition to surplus of November 1st, 1870, which was earned between August 1st and November 1st, and likewise that part of the dividend and surplus of May 1st, which was earned in November and December 1870 were exempt, that is to say, apportioning the dividends as to their taxability, instead of treating the date of the declaration as the taxing date, the times of the accrual of the earnings were set forth in the City Bank suit, to provide for this possibility.

These being test suits of a large number of actions brought by the New York Associated Banks, it was considered desirable to raise all the possible questions which could arise in them.

The court below having held that the date of the *declaration* of the dividend and not of its *earning* was the taxing date, no findings were made of the dates at which the moneys divided were earned.

The simple question in all these cases is whether dividends declared, additions made to surplus, and State and municipal taxes paid out of earnings, in the last five months of 1870, are taxable. The opinion of the court below in all these three cases appear in Schedule B, hereto annexed.

The opinion of Lowell, J., in a case decided in the Massachusetts Circuit is hereto annexed and marked C.

POINTS.

I.

The claim of the plaintiffs is that under section 15 of the Act of July 14th, 1870 (U. S. Statutes at Large, vol. 16, at page 260), such dividends are not taxable.

Prior to the passage of the last named act, the Act

of June 30th, 1864 (U. S. Sts. at Large, vol. 13, page 223), as amended by the Act of July 13, 1866 (see 14 Sts. at Large, at page 138), was in force, and by the provisions of section 120 thereof a duty or tax of five per centum was imposed upon dividends of the character of those in question.

The Act of July 14th, 1870 (*ubi supra*) was designed to reduce internal revenue taxes, and such is its title.

Section 17 thereof provides that section 120 of the Act of June 30th, 1864, "Shall be construed to im-"pose the taxes therein named to the first day of "August, 1870, but after that date no further tax shall "be levied or assessed under said section."

It is then provided by said section 17 that all taxes properly assessed or liable to be assessed under the acts repealed shall be preserved, and the machinery for their levying and collection shall be retained.

We do not understand it to be disputed that if the Act of July 14th, 1870, had stopped here, no tax could have been imposed upon a dividend declared in December, 1870.

Section 120 of the Act of 1864, as modified by the Act of July 14th, 1870, imposed the taxes therein mentioned only until August 1st, 1870, and this dividend having been declared (and the *declaration* being the taxing date as to dividends—see remarks at the close of the opinion in The Phila. & Reading R. R. Co. *vs.* The Assessor, reported in vol. 12, Internal Revenue Record, at page 112, and Clapp *v.* Astor, 2 Edwards Chancery R. (N. Y.), page 379), in December, there was no statute then in operation (so far as said section 17 is concerned) taxing it.

The power to levy and collect the tax complained of, if it exists at all, is to be found in section 15 of the Act of 1870. This section, so far as it relates to the point in question, reads as follows:

Sec. 15. And be it further enacted that there shall be levied and collected *for and during the year* 1871, a tax of two and one-half per centum on the amount of all dividends of earnings, income, or gains *hereafter* declared by any bank, whenever the same shall be payable, and to whatsoever person the same may be due, including non-residents, whether citizens or aliens, and on all undivided profits of any such corporation which have accrued and been earned and added to any surplus, contingent or other fund. * * * * * *

It cannot be denied that the words "for and during the year 1871," mean *something*—something is restricted to be done in that year.

Only two constructions are possible, one of which is to hold that the thing to be limited to be done in 1871 is the "levying and collecting." This would make the meaning "A tax of 2½ per cent. on the "amount of all dividends hereafter declared shall be "levied and collected in the year 1871." T
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in error and is the ground taken by the
general of the United States in the opinion
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The only other construction possible is to hold that the words "for and during the year 1871" apply to, and limit, and are intended to describe, the time of the earning of the money out of which the dividends are

of June 30th, 1864 (U. S. Sts. at Large, vol. 13, page 223), as amended by the Act of July 13, 1866 (see 14 Sts. at Large, at page 138), was in force, and by the provisions of section 120 thereof a duty or tax of five per centum was imposed upon dividends of the character of those in question.

The Act of July 14th, 1870 (*ubi supra*) was designed to reduce internal revenue taxes, and such is its title.

Section 17 thereof provides that section 120 of the Act of June 30th, 1864, "Shall be construed to im-"pose the taxes therein named to the first day of "August, 1870, but after that date no further tax shall "be levied or assessed under said section."

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Sec. 15. And be it further enacted that there shall be levied and collected *for and during the year* 1871, a tax of two and one-half per centum on the amount of all dividends of earnings, income, or gains *hereafter* declared by any bank, whenever the same shall be payable, and to whatsoever person the same may be due, including non-residents, whether citizens or aliens, and on all undivided profits of any such corporation which have accrued and been earned and added to any surplus, contingent or other fund. * * * * * *

It cannot be denied that the words "for and during the year 1871," mean *something*—something is restricted to be done in that year.

Only two constructions are possible, one of which is to hold that the thing to be limited to be done in 1871 is the "levying and collecting." This would make the meaning "A tax of 2½ per cent. on the "amount of all dividends hereafter declared shall be "levied and collected in the year 1871." This is the doctrine of the U. S. Government and of the plaintiff in error, and is the ground taken by the attorney-general of the United States in the opinion hereto annexed as Schedule "A," upon which the secretary of the treasury acted. They in effect claim that the limitation to the year 1871 does not apply to the accruing or to the declaring of the dividend to be taxed, but only to the time when the tax shall be levied and collected, and they say that the words "hereafter declared" show that the tax is to be levied on all dividends declared after the passage of the act (July 14th, 1870), and that therefore a dividend declared in December, 1870, being "hereafter declared," must pay the tax, though the levying and collecting shall be postponed to 1871.

The only other construction possible is to hold that the words "for and during the year 1871" apply to, and limit, and are intended to describe, the time of the earning of the money out of which the dividends are

declared, and also the time of the declaration of the dividends, that is to say, dividends are not to be taxed unless they are either declared in that year, or the moneys from which they are declared are earned therein, and the object of the section is to tax only dividends declared or earned in that year.

In accordance with this view, we construe the section as though it read "a tax of 2½ per cent. shall be "levied and collected on the amount of all dividends "hereafter declared for and during the year 1871."

We ask the court first to satisfy itself that these are the only two constructions possible to be given to the restriction indicated by the words in question. This seems obvious, for if, as the plaintiff in error contends, the words in question do not mean that the accrual of the earnings to be taxed, or the declaration of the dividends are confined to that year, then the only thing left to be operated on by these words, and to be confined to that year, is the levying and collection, since the only elements of a tax on dividends are: *first*, the earning of the money; *secondly*, the declaration of the dividand; *thirdly*, the assessment (or levying), and; *fourthly*, the collection. Unless the first two are restricted to the year 1871 (and the plaintiff in error says they are *not*), the last two must be. This being established, we proceed to the arguments which show that our construction of the section is the correct one.

II.

The method of levying and collecting the tax on dividends is as follows:

The officers of the corporation declaring the dividend are required to make a return to the assessor of the proper district on or before the 10th day of the month following that in which the dividends become due or payable, of the amount of said taxes.

Section 120 of Act of July 13th, 1866 (14 U. S. Sts. at Large, at page 138), and section 16 of Act of July 14th, 1870 (16 U. S. Sts. at Large, at page 260).

As it thus appears that the tax on dividends is not levied (*i. e.*, assessed) until the month following that in which the dividends become due or payable, of course it cannot be collected until still later.

Hence it follows that the "levying and collection" of the tax on the dividends of December, 1871, could not be and was not done until at least January, 1872, or at least until after the end of 1871.

The court takes judicial notice of the general course of business (see Agawam Bank *vs.* Strever, 18 N. Y., at middle of page 512, and Bronson *vs.* Wiman, 10 Barbour, 406), and therefore knows that it is the almost universal practice of corporations to declare dividends in December, payable either on one of the last days of that month or on the first day of the following January.

Thus large amounts of dividends were declared and made payable in December, 1871, the taxes on which were levied and collected early in 1872. Now, if the claim of the government in this case that the thing limited by section 15 of the Act of July 14th, 1870, to be done "for and during the year 1871," was the "levying and collecting," then the collection of the taxes on the dividends of December, 1871, was all illegal, and they can be recovered back.

The government of the United States has always claimed that all dividends of 1871 should pay the tax, and has acted accordingly and collected them in 1872. This could only be done on the theory that, not the levying and collecting was limited to 1871, but that the

thing limited was something else, and it could be nothing else but the accrual of the thing to be taxed, or the declaration of the dividend.

This practice of the goverment is, of course, not conclusive as to the meaning of the words "for and during the year 1871," but it is wholly inconsistent with its present claim, and the court must bear in mind that in adopting the construction claimed by the government in this case, it will be laying down a rule which will require it to hold that all taxes which have been collected on the dividends of December, 1871, can be recovered back. The attorney general in his memorandum at the close of Schedule A. hereto annexed, indicates that he sees this difficulty, but being then concerned only in establishing the taxibility of the dividends of December, 1870, he does not pursue the question, what must become of the dividends of December, 1871.

It is thus clear that upon the construction contended for by the plaintiff in error, a dividend declared in December, 1870, would pay a tax of $2\frac{1}{2}$ per cent., while a divdend declared in December, 1871, would pay no tax at all. The result would be that dividends declared in 1870 would pay a tax of $3\frac{3}{4}$ per cent. (5 per cent. on the first of the two half-yearly dividends, and $2\frac{1}{2}$ per cent. on the last half-yearly dividends, the average being $3\frac{3}{4}$ per cent.), and dividends declared in 1871 would pay only an average tax of $1\frac{1}{4}$ (*i. e.*, the first half yearly dividend would pay $2\frac{1}{2}$ per cent., and the second half yearly dividend would pay nothing, average $1\frac{1}{4}$ per cent.). It makes no difference to the banks in which way it is done, but in construing an ambiguous law it is certainly more reasonable to suppose that Congress intended that those whose incomes were derived from bank dividends should pay $2\frac{1}{2}$ per cent. tax in 1870, and $2\frac{1}{2}$ per cent. in 1871 (which would be the result of our theory), than

it is to suppose that the intention was that they should pay $3\frac{3}{4}$ per cent. in 1870 and only $1\frac{1}{4}$ in 1871 (which would be the result of the plaintiff in error's theory). The former disposition of the tax would be simple and equal in its distribution, and conform to the rule applied to taxes on incomes derived from other kinds of business.

III.

Another argument in favor of the construction that the limitation imposed by the words, "for and during the year 1871" was intended to apply to the earning and declaration of the dividend, rather than to the levying and collection of the tax, is that this is plainly the meaning of similar words used in other sections of the very act under consideration.

Thus in section six the words "there shall be "levied and collected for the year 1871, a tax on in- "comes, &c., &c.," mean that the tax shall be levied on incomes which *accrue* in 1871. It does not mean that the tax shall be "levied and collected" in 1871. The income tax was levied in March and collected in April, upon the income of the year ending on the previous 31st of December.

Under section six, just quoted, incomes for the year ending December 31st, 1871, were levied and collected in 1872; no one thought of claiming that the thing restricted to be done in 1871 was the levying and collecting, as is now claimed in construing these words in section 15.

In short, when it is clear that these words, *i. e.*, the words "there shall be levied and collected for the year 1871," in section six, means that "a tax of two and one- "half per cent. shall be levied and collected on in- "comes *accruing in* 1871," why do not the same words

(*i. e.*, the words "there shall be levied and collected for and during the year 1871"), in section 15, mean, as we claim, "a tax of two and one-half per cent. shall "be levied and collected on monies earned for divi- "dends in 1871."

Why should the words "for the year 1871" apply in section 6, to the *time of accrual of the thing to be taxed*, and the words "for and during the year 1871,' in section 15, to the time of the *levying and collection*.

The only difference is that, in section six, the language is "for the year 1871," and in section 15, "for and *during* the year 1871." But the meaning of "for" is the same in both sections, 6 and 15, the word "during" being added in the latter section to also express the meaning that dividends declared during 1871, are to be taxed whenever earned.

Then in section 17 of the Act of July 14th, 1870, the words used are "After August 1st, 1870 (*i. e.*, after "that date) no further taxes shall be levied or assessed "under said sections."

Here, again, the words refer to the time of the accruing of the thing to be taxed, and mean that dividends, &c., declared or earned after that date shall not be taxed. They do not mean that no "levying and assessing" shall be done after August 1st. For dividends declared in July, 1870, are plainly taxable, and yet the returns of them need not be made to the assessor until August 10th, and the tax would not be levied and assessed until on or after that day. See the provisions hereinafter cited, as to time of returns and assessments, and section 15 expressly retains in force after August 1st the levying and assessing machinery.

When it thus appears that similar words of time in sections 6 and 17 of this act apply not to the taxing, but to the time of the accrual of that which is to be taxed, they should, upon a familiar principle of construction, receive the same construction in section 15.

IV.

And another difficulty which you get into by construing the words "for and during the year 1871" to apply to the levying and collection, and to restrict these operations to that year, is this:

We have seen that, by the general scheme for the assessment and collection of the tax on dividends, it must be levied and collected in the course of the next month, or the next month but one, following the declaration of the dividend. Thus when a dividend is declared in September, 1870, the return to the assessor (if, as the defendants claim, the dividend is taxable) must be made on or before October 10th, 1870, and the tax must be collected within a month from that time.

But by the construction claimed by the plaintiff in error the general plan which has prevailed in the internal revenue laws from the beginning (and which is unquestionably preserved in this very law of July 14th, 1870, as to the time of the levying and collection of the tax on dividends declared in every other month except the last five months of 1870), is broken in upon as regards the dividends declared in the last five months of 1870. As to such dividends, the levying and collection of the tax is (if the theory of the plaintiff in error is right) arbitrarily and without a shadow of reason postponed to 1871, and instead of the tax on dividends of each month being levied and collected separately and by itself on the following month, are all lumped together and their levying and collection postponed to 1871. It is reasonable to suppose that if Congress had intended to tax dividends declared in any of the last five months of 1870, the levying and assessing of the tax would have been left to be done, as usual, in the following months.

No posssible reason appears for this alleged departure from the general rule as to the time of levying and collecting, and it is a strong argument, in a doubtful

case, against the plaintiff in error's construction that it will lead to such a result.

And this is not all. By holding that it is the levying and collecting which are postponed until 1871 by the words in question, you not only break in upon the general scheme of all the internal revenue acts as to the time of assessing and collecting these taxes, but you override the express provisions of the very law which you are construing. That law says *expressly* as to the levying (act of July 14th, 1870, sec. 16), that the assessment (or return to the assessor), shall be made in the next month, that is, that the tax on dividends declared in September, 1870, shall be assessed in October. By the construction of doubtful words you say, if you adopt the theory of the plaintiff in error, that this tax shall not be assessed until the next year.

V.

When we pass from a consideration of the consequences of the plaintiff in error's construction to an examination of the natural meaning of the words themselves, it is equally clear that section 15 of the Act of July 14th, 1870, only means to impose a tax on dividends declared in 1871.

The plaintiff in error construes the section as though it read "A tax of 2½ per cent. on the amount of all "dividends hereafter declared shall be levied and col- "lected for and during the year 1871," making "for "and during the year 1871" apply to the levying and collection only.

If Congress meant this, they have not used apt and natural language to express their meaning. If the meaning were as claimed, the sentence would have naturally read, "there shall be levied and collected *in the year* 1871." If I wish to indicate the time when a

tax shall be levied and collected, I say it shall be levied and collected "*in* the month of January," for example, and not "*for* the month of January." The latter form of expression, means that the tax is to be upon the *product* of the month of January, on its income or dividends. Thus we have seen that under section 6 of this act (July 14th, 1870), the words "a tax shall be levied and collected on incomes for the year 1871," means that the tax is to be levied on the income or product of 1871, and not that the tax shall be levied *in* 1871. "*For*" does not mean "*in*."

It is true that the words of section 15 are "for and *during* the year 1871," and not simply "for the year 1871," and that the word "during" is in some degree appropriate to express the time when a tax is to be levied and collected. If the language had been "a "tax of 2½ per cent. on all dividends, &c., hereafter "declared, shall be levied and collected during the "year 1871," the construction claimed by the plaintiff in error would not (so far as the mere meaning of the words is concerned) have been so unreasonable as it now is in view of the use of the word "for."

But is a fundamental rule of construction that the language of a statute should be construed so as to give force and effect to every part. Now upon the theory that the words "for and during the year 1871" are used to designate the time when the tax is to be levied and collected, the word "for" is, as we have seen, not only superfluous, but entirely inappropriate. To levy and collect a tax "for the year 1871," in no way indicates that that year is to be the time of the *levy* and *collection*.

It is submitted that the court will not adopt a construction which will require the ignoring and rejection of the word "for."

If, however, you adopt our construction of section 15, full force and effect is given to both "for" and "during."

We say the statute means that "a tax of 2½ per

" cent. shall be levied and collected on the amount of " all dividends hereafter declared, for and during the " year 1871." In this view both " for " and " during " are appropriate to the object which they are used to express.

Dividends declared " for the year 1871 " naturally means dividends declared out of the earnings of that year. Thus in Strong *v.* The Sun Ins. Co. 31, N. Y. R., page 103, " for " is construed to mean " on account of " " by reason of " " because of." Dividends declared out of the earnings of the year, that is, " on account of " the year, " by reason of the year," and " because of the year " are to be taxed. Also dividends declared " during the year " are to be taxed.

Hence our construction gives force and effect to all the words used, and makes the language appropriate. The construction of the plaintiff in error requires the rejection one of the words.

In a doubtful case, the court should not hesitate between these two constructions.

It may be argued, as suggested and combated by Judge Shipman in the Park Bank case (see folio 29 of the record in that case, and page 38 of these points), that the word " during " sometimes means " until the end of," and that the words in question may be separated, so that the law may mean " a tax shall be levied and collected on all dividends " hereafter declared for the year 1871, and also on all " dividends hereafter declared, until the end of 1871," the latter words including all the time between the passage of the Act of 1870 to the end of 1871, and hence including the dividend in question.

The conclusive answer to this is that " during the year 1871 " includes all the period from the beginning of the year to the end, but not the period between the passage of the act (July 14th, 1870) and the beginning of the next year. In other words " during " means " *from the beginning* to the end of," and not simply " until the end of " counting from some time previous to the beginning of the period spoken of; so that the

meaning of the word "during" referred to by Judge Shipman would exclude the dividends prior to 1871.

So it may be claimed that, even conceding that the words "for the year 1871" are a limitation upon the product to be taxed—that is to say, show that it is the earnings of that year which are to be taxed—yet the words, "during the year 1871" are intended to limit the "levying and collecting" only; so that besides subjecting to taxation dividends declared from the earnings of 1871, the law also means that a tax may be "levied and collected during 1871, on all dividends hereafter declared."

In other words, that the law means, "there shall "be levied and collected a tax of 2½ per cent. on div- "idends hereafter declared for the year 1871, and also "there shall be levied and collected during 1871, a tax "of 2½ per cent. on dividends hereafter declared."

The answer to this is that if the word "for" applies to and limits (as its meaning shows that it must) only the words "dividends declared," the word "during" clearly does the same. The close connection between "for" and "during," as the parts of one sentence, shows that they refer to and limit the same thing or words. Unless "for 1871" limits levying and collecting, it is impossible to hold that "during 1871," a part of the same sentence, does.

VII.

The great argument in favor of the construction contended for by the plaintiff in error is the use, in section 15, of the word "hereafter."

The law was passed on July 14th, 1870, and a dividend declared in December, 1870, is a dividend "hereafter" declared, and hence it is argued that it is liable to taxation. If that word did not exist in the law,

there could be no question that the words "for and during 1871," excluded a dividend of December, 1870.

If the word "hereafter" were *repugnant* to the meaning given by us to the words "for and during the year 1871," so that one or the other of these two expressions must be wholly rejected, the question might be a more serious one.

But the fact is that the word "hereafter" is not repugnant to, or inconsistent with, our view of the meaning of the other words. On the contrary, you may give full force to the word "hereafter" without in any way impairing the accuracy of our construction. We claim that the word is qualified by the previous language "for and during the year 1871," and that "hereafter" must be restricted to that year, so that the meaning of the whole is "hereafter declared for and during the year 1871." It is true that, upon our view, the word "hereafter" is superfluous, and adds nothing to the meaning, inasmuch as if it were intended by Congress only to tax dividends declared out of the earnings of 1871 or in 1871, such dividends would necessarily be dividends "hereafter declared," and it was needless so to designate them.

But the use of a merely superfluous word should not be permitted to throw doubt upon the otherwise plain meaning of the law, especially when full force can be given to it by subjecting it to the qualifying influence of the previous words, and reading the whole as "hereafter declared for and during the year 1871."

Upon the theory of the plaintiff in error, you not only get a superfluous word, but one which is wholly inconsistent with the meaning which he claims, that is, repugnant.

Thus we have shown above, that if what Congress meant to limit and restrict to be done in the year 1871, was the "levying and collection," then the word "for" is not only superfluous (as not adding to the meaning sought to be expressed), but is repugnant to that meaning (as meaning something very different). To

say that the "levying and collection" must be done "during 1871," may be proper langugge to express the idea, but to say that it must be done "for 1871" can by no ingenuity be tortured into meaning "in," or to express the meaning claimed by the plaintiff in error, to wit, the time of the levying and collection.

Therefore, if it is argued against us that our view supposes that Congress has used a superfluous word, we answer that the other view supposes it to have used a word, not only superfluously, but inappropriately and repugnantly, which is a much greater evil.

It is a very common thing for a word to be used needlessly in a law, but to use one inappropriately, and as meaning something else than is plainly sought to be expressed, is a more serious and uncommon inaccuracy, and the court should rather incline to our construction, which merely imputes to Congress the use of a word needlessly, than the defendant's construction, which imputes to the law-maker the use of a word to express an idea which it plainly does *not* express.

The court takes judicial notice of all public archives, including the journals of the Houses of Congress.

See Romero *vs.* U. S., 1 Wallace, 721, and at page 742.

And it appears, by the opinion of Judge Shipman, in the Park Bank case, in the court below, and in that of Judge Lowell hereto annexed, that the words "for and during the year 1871," were inserted upon the report of a conference committee, and without debate. If this be so, it is very evident that the word "hereafter," which then became useless, was suffered to remain because of an oversight, in the hurry which always attends such proceedings, to strike it out. One can hardly read the section, in view of this explanation, without a strong conviction that such was the case.

But putting out of view the method in which these words were inserted, as above stated, it is easy to see how the word "hereafter" could have been carelessly

used by accident or inattention. Laws imposing taxes are generally prospective and not retrospective. Such laws, in taxing dividends, would, therefore, usually provide for the taxing of dividends "hereafter declared," and Congress, in this case overlooking the fact that the words "for and during the year 1871" already sufficiently indicated that only future dividends were to be taxed, might very naturally insert the usual words "hereafter declared."

That its use was an oversight, and not vital in the intention of Congress, is further shown by the fact that "hereafter" is omitted in speaking of the tax on interest and coupons.

Section 15 provides "that there shall be levied and "collected for and during the year 1871 a tax of two "and a half per cent. on the amount of all interest "or coupons paid on bonds of corporations, and on the "amount of all dividends of corporations 'hereafter' declared," &c., &c.,

The word "hereafter" is used only as to dividends. and if the case be decided on the ground of the use of the word "hereafter," you must hold that dividends declared in the last five months of 1870 are taxable, while interest paid during the same period on corporation bonds is not. But in all the internal revenue acts the interest on corporate bonds and corporate dividends have been treated as precisely similar for purposes of taxation, and no reason can be suggested why the one should be taxed during the last five months of 1870, and other should not.

It is very hard to believe that Congress intended at this late day to make a distinction between interest and dividends, and it is much easier to believe that "hereafter" was not vital in the opinion of Congress, but was inserted carelessly and accidentally, than to believe that it was intentionally inserted as to dividends and intentionally omitted as to interest.

Practically, interest and dividends have both been treated alike by the government under this law, and

interest paid on bonds in December, 1870, has been taxed, as well as dividends declared during that month. Thus the word "hereafter" has been treated as superfluous, and disregarded in practice by the government.

In the opinion of the attorney-general, upon which the secretary of the treasury acted in enforcing the law (which opinion is hereto annexed, as Schedule A, and which will be commented upon hereafter), it was held that interest on bonds paid in the last five months of 1870 was taxable, notwithstanding the omission of the word "hereafter" in speaking of such interest. And, in arriving at this conclusion, the attorney-general was driven to take this very ground that Congress had always treated interest on bonds and dividends as subject to the same rules of taxation, and that it could not be supposed that a difference was intended now.

The attorney-general therefore drew the conclusion that "hereafter" applies as well to the interest as to the dividends. I submit that much less violence is done by holding "hereafter" to be superfluous, and to have been inadvertently inserted, under the circumstances above stated, than to insert the word boldly in a part of the sentence where it does not occur, and to apply it to interest when the words of the law apply it only to dlvidends.

There being upon both constructions a difficulty about the word "hereafter," there can be no question that our way of avoiding it is most in harmony with the meaning of the statute as drawn from its general language, and is most in accordance with the sound rules of interpretation.

VII.

The opinion of the attorney-general above referred

to is hereto annexed, and we proceed to criticize its reasoning.

After stating the case and citing the sections to be construed, the opinion lays down the proposition that the tax on interest on corporate bonds and on dividends are part of the general income tax and that the rate of taxation on t hem has always been, and is intended to be, the same as that imposed upon the income of individuals.

This proposition we entirely assent to, but not to the conclusion drawn from it by the attorney-general. That conclusion is, that if dividends declared in the last five months of 1870 are exempt from taxation, it will follow that "a favor is shown to the owners of this "species of property"(*i. e.*, the stock and bonds of corporations).

Now this conclusion is a plain and palpable mistake.

It is not true that if these dividends are exempt, the holders of the stock will have an advantage over those whose income is derived from other sources, but the truth is directly the reverse. The fact is, that unless you exempt those dividends, the owners of stock will pay *more taxes* than those deriving their income from other sources. And it is clear that this very desire to establish an equality of income taxation was the reason which induced Congress to exempt from taxation dividends declared in the last five months of 1870.

We agree with the attorney-general that the object of the Act of July 14th, 1870, is to reduce the tax on gains, incomes and profits derived from any source whatever, from 5 per cent. to $2\frac{1}{2}$ per cent., and that interest on corporate bonds, dividends and income from other sources, are all intended to be treated alike.

This being the intention of Congress, let us see what was necessary to be done.

The court takes judicial notice of the course of business. (Agawam Bank *vs.* Strever, 18 N. Y., at the middle of page 512, and Bronson *vs.* Wiman, 10 Barbour 406.)

The court therefore knows that corporations almost invariably declare two dividends yearly—one during the first six months of the year, and one during the last six months, and that the limit of August 1st, 1870, would practically include all the first half-year dividends. Thus, the Park Bank declared a dividend in July 1870, and paid 5 per cent. tax on it. If it be required to pay a tax of $2\frac{1}{2}$ per cent. upon its December dividend, its stockholders will have paid $3\frac{3}{4}$ per cent. taxes on their income derived from bank stock. But persons whose incomes are derived from other sources than interest on corporate bonds and dividends on corporate stock will pay only $2\frac{1}{2}$ per cent. on their income for 1870, because the ordinary income tax for 1870 is not levied or collected until 1871, when the $2\frac{1}{2}$ rate comes into force.

The tax on ordinary incomes is levied in March of the succeeding year and collected in April (section 10 of Act of July 14th, 1870, and the previous law was the same), while the tax on interest or dividends is levied and collected in the month succeeding the payment of the interest or dividends. The act of July 14th, 1870, having been passed after the first half-yearly dividends had paid a tax of five per cent., the equality could only be restored by exempting the second half-yearly dividends from any tax at all.

The premises of the attorney-general are certainly correct, *i. e.*, that income from dividends was designed to be treated in the same way as income from other sources—but the *conclusion* to be drawn is just the reverse from that drawn in the opinion.

The next argument of the attorney-general in favor of his construction, is the use of the word "hereafter" in the section.

This we have already discussed.

Then he says that the words "for or during the year "1871" refer to the time of the levying and collection, rather than the time of the declaration of the dividends and the accrual of the tax.

We have already given the reasons which we claim lead to a different conclusion.

VIII.

It is true that "incomes"—that is, incomes proper, the tax on which is paid directly by the individual—for the last five months of 1870, are taxed, being included in the incomes of the whole year 1870.

But the Barnes and Stockdale cases having decided that the tax on dividends, &c., and the income tax proper, were not analogous so as to *save* the former from taxation, they certainly are not analogous so as to *subject* the former to taxation, and, as before stated, the view for which we contend really puts the two kinds of taxes on an equality for 1870, inasmuch as the dividends have already paid five per cent. on the first semi-annual declarations.

IX.

The case of the Fourth National Bank, now before the court, involves precisely the same questions as those which we have been considering. It only differs from the Park Bank case in that, besides a tax on dividends, a tax was imposed upon the amount added to surplus in the last five months of 1870.

The taxability of both dividends and surplus is provided for in the same section and depends upon the same considerations.

X.

In the National City Bank case a dividend was declared in October, 1870, payable on November 1st,

1870, and on the last mentioned date an addition was made to surplus.

This dividend and addition to surplus having been declared and made between August 1st, 1870, and January 1st, 1871, were not taxable if our above position be sound.

The declaration and facts agreed upon in the City Bank case also show a dividend declared in April, 1871, payable on May 1st, 1871, and an amount added to surplus on the last named date.

But in our view it is only the dividend and amount added to surplus of November 1st, 1870, which are exempt from taxation, the dividends being taxable as of the date of their declaration and not of the accrual the gains out of they are paid.

It is, therefore, not insisted that the dividend payable on May 1st, 1871, and the amount then added to surplus were exempt from taxation. But if the court should be of opinion that the true rule is to exempt from taxation those parts of the dividends which were paid from the earnings of the last five months of 1870, without reference to the time of the declaration of the dividends, a new trial should be ordered, that such disposition may be made of the case.

XI.

The judgments in the three cases should be affirmed.

CHARLES C. BEAMAN,
Attorney for
The National City Bank, } Defend-
The Fourth National Bank, } ants in
The National Park Bank, } Error.

FRANCIS C. BARLOW,
Of Counsel.

New York, Feb. 12th, 1875.

Schedule A.

DEPARTMENT OF JUSTICE,
WASHINGTON, May 3, 1871.

Hon. A. T. AKERMAN,
Attorney-General.

Sir,—I beg leave to submit the following opinion in answer to the letter of the secretary of the treasury of the 20th ultimo, referred by you to me, submitting to you certain questions on the proper construction of the Act of July 14, 1870 (16 Statutes at Large, p. 256), entitled "An Act to reduce internal taxes, and for "other purposes." The questions asked are as follows:

"1. Is the tax on interest, or coupons paid on bonds, "or other evidence of debt, imposed by the fifteenth "section of the above mentioned act, applicable to "interest paid subsequently to August 1st, 1870, and "prior to January 1st, 1871?"

"2. Is the tax on dividends of earnings, income or "gains, imposed by the same section, applicable to "dividends declared subsequently to August 1st, 1870, "and prior to January 1st, 1871?"

"3. Should officers and employes of the United "States, and senators, representatives, and delegates "in Congress, from whose pay or salary a tax at the "rate of five per cent. per annum has been withheld "continuously since December 31st, 1869, be required "to include in their income returns for 1870, the pay "or salary received by them during the last five "months of 1870, on which no tax has been with-"held?"

In order to ascertain the intention of Congress in respect to the subjects of these questions, it is neces-

sary to consider the different sections of the above act referring to this subject matter.

By section six it is provided: "That there shall be "levied and collected annually, as hereinafter pro- "vided, for the years 1870 and 1871, and no longer, a "tax of two and one-half per centum upon the gains, "profits and income of every person residing in the "United States, and of every citizen of the United "States residing abroad, derived from any source "whatever, whether within or without the United "States, except as hereinafter provided."

By section seven it is enacted: "That in estimat- "ing the gains, profits and income of any person, "there shall be included all income derived from * * * "the gains, profits and income of any business, pro- "fession, trade, employment, office or vocation, in- "cluding any amount received as salary or pay for "services in the civil, military, naval or other service "of the United States, or as senator, representative "or delegate in Congress, except that portion thereof "from which, under authority of Acts of Congress "previous hereto, a tax of five per centum shall have "been withheld."

Section fifteen, the language of which causes the difficulty in this case, enacts: "That there shall be "levied and collected for and during the year 1871, a "tax of two and one-half per centum on the amount "of all interest or coupons paid on bonds or other "evidences of debt issued and payable in one or more "years after date, by any of the corporations in this "section hereinafter enumerated, and on the amount "of all dividends of earnings, income or gains hereafter "declared by any bank, trust company, savings institu- "tion, insurance company, railroad company, canal "company, turnpike company, canal navigation com- "pany and slackwater company, whenever and where- "ever the same shall be payable, and to whatsoever "person the same may be due."

Section sixteen enacts: "That every person having

"the care or management of any corporation liable "to be taxed under the last preceding section, shall "make and render to the assessor or assistant assessor "of the district in which such person has his office for "conducting the business of such corporation, on or "before the tenth day of the month following that in "which any dividends or sums of money became due "or payable as aforesaid, a true and complete return, "in such form as the commissioner of internal revenue "may prescribe, of the amount of income and profits "and of taxes as aforesaid."

The tax imposed by section fifteen on interest paid, and dividends declared by corporations, is a part of the general income tax, which, in this case, for the sake of convenience, is collected from the corporation before the interest or dividend is paid, and the amount thereof reserved therefrom by it when payment is made to the bondholder and stockholder; and the rate of taxation has always been the same as that imposed directly upon the income of individuals.

A comparison of the sections above quoted with those of former acts of Congress imposing the income tax, and of which these are amendatory, show that the principal intention of Congress was to impose an income tax for the years 1870 and 1871, payable in the years 1871 and 1872, of one-half the amount of the former income-tax, and to provide that the tax on salaries of public officers should hereafter be collected in like manner as the tax on other incomes. It is hardly necessary to say that in construing this statute all statutes and parts of statutes in *pari materia* must be considered in connection with it, and that in construing any particular provision of the statute, reference must be made and respect had to the general purpose and intent of the Legislature, as gathered from the entire statute.

The first and second questions, asked by the secretary of the treasury, depend upon the construction to be given to section fifteen, and, in my

opinion, had better be considered together. Taken by itself, this section is undoubtedly obscure, and persons may differ widely in respect of the construction to be put upon it. The difficulty is found in the words "for and during the year 1871." Do these limit the tax to interest paid and dividends declared during that year? If they do, then, undoubtedly, no tax is payable on interest paid and dividends declared between the date of the statute, July 14, 1870, and January 1, 1871. But the difficulty of such a construction is that not only does it show a favor to persons owning this species of property, entirely out of harmony with the general design and intention of Congress, as apparent from other parts of this statute, and from former statutes, but no force whatever is given to the word "hereafter" in the seventh line of the section. Such a construction is not to be presumed, and I am of opinion that, however plausible it may appear at first, it is not the one that sound rules of interpretation demand should be placed upon this section.

In the construction of a statute, a limiting clause is to be confined to its last antecedent, unless there is something in the subject matter which imperatively calls for a different construction. Dwarris on Statutes 590, 591; Cushing *v.* Worrick, 9 Gray, 382. Applying, this rule to the words "for and during the year 1871" in this section, it will be perceived that they refer solely to the levying and collection of the tax and not to the property on which the tax is imposed. Now, I think that the words "levied and collected" have reference rather to the time when the amount of the tax is ascertained and payment is demanded, than to the time when the tax accrues—that is to say, when the property is acquired upon which it is assessed. The income tax on individuals is levied and collected the year after the income upon which it is imposed is acquired. This meaning of the words "levied and collected" is conclusively established by reference to section ten, which provides: "That the tax hereinbe-

" fore provided shall be *assessed* upon the gains, profits " and income for the year ending on the 31st day of " December next preceding the time for *levying and* " *collecting* said tax, and shall be *levied* on the first day " of March, 1871 and 1872, and be due and payable " on or before the 30th day of April in each of said " years." The provision, therefore, that this tax is levied and collected for and during the year 1871 does not at all limit the kind of property upon which it is assessed, or require that it shall be assessed on the interest and dividends of that year only. But, although payable in the year 1871, it must be paid, not only upon the interest paid and dividends declared during that year, but also upon such interest and dividends for the last five months of the preceding year.

By this construction not only is effect given to the words " for and during the year 1871," and bondholders and stockholders placed upon the same footing as other people who pay income tax, and the case of corporations thus brought into entire accord with the other provisions of the statute, but full effect is also given to the word " hereafter," which imperatively requires, to say the least, that all dividends declared after the passage of the act shall pay a tax.

But it may be asked, why cannot the word " hereafter" have effect by holding that dividends declared after July 14, 1870, and before January 1, 1871, are to pay a tax, while interest or coupons are exempted from payment? The answer is, that the construction of the sentence forbids, as I have before said, that the words " for and during the year 1871," should refer at all to the property upon which the tax is levied, while the collocation of these two species of property in the same sentence, and the similarity between them, would make it highly improbable that Congress should intend that one should be subjected to a tax during the year 1870, while the other was exempted from it.

But I think that any such construction as this is incompatible with the provisions of section sixteen, re-

quiring "that every person having the care or man-
"agement of any corporation liable to be taxed under
"the last preceding section, shall make and render to
"the assessor or assistant assessor of the district
"* * * on or before the tenth day of the month
"following, that in which any dividends or sums of
"money become due or payable as aforesaid, a
"true and complete return;" a provision which applies to the case of interest as well as to dividends, and shows, conclusively, in my opinion, that no such distinction as is here suggested can be made between them.

The first and second questions, therefore, put by the secretary of the treasury, must be answered in the affirmative.

The third question seems to me to be settled by the very words of the statute. Section six expressly levies a tax on income for the years 1870 and 1871, and section seven enacts that in estimating this income, salary or pay for services in the service of the United States, shall be included, "except that portion thereof from which, under authority of Acts of Congress previous hereto, a tax of five per centum shall have been withheld." No such tax was withheld on any salary paid after this act took effect.

Salaries, therefore, paid between the 14th of July, 1870, and the 1st of January, 1871, come within the exact letter of the statute.

I think, therefore, that the third question also must be answered in the affirmative.

I have the honor to be, sir,
Your very obedient servant,
CLEMENT HUGH HILL,
Assistant Attorney-General.

DEPARTMENT OF JUSTICE,
Washington, D. C.,
May 11, 1871.

This opinion is approved, so far as it answers the questions presented by the secretary of the treasury.

Perhaps some of the reasoning would lead to the conclusion that the tax of two and a half per cent. on interest and coupons paid on bonds, &c., imposed in the Act of July 14, 1870 (16 U. S. Statutes, 256), will not be due for interest accruing in 1871, but not paid until 1872. I am not satisfied that such a conclusion is warranted by the law.

A. T. AKERMAN,
Attorney-General.

Schedule B.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE NATIONAL PARK BANK OF NEW YORK

vs.

MARSHALL B. BLAKE.

SHIPMAN, J.—This action was tried before the court, a jury having been waived by written stipulation of the parties.

The following statement of facts was agreed by the parties, and is found by the court to be true:

That the allegations of the declaration down to the words "And, whereas, on the 16th day of December, 1870, the said plaintiffs declared a dividend" are true (being the formal matters to give jurisdiction).

That on the 16th day of December, 1870, the plaintiffs declared a dividend of $123,076.92 from their earnings, income and gains, and that said dividend was, by the terms of its declaration, made payable to stockholders on the 27th day of December, 1870, and was prior to the assessment hereinafter mentioned paid to the several shareholders entitled to receive the same, and that neither the tax of two and one-half per cent. hereinafter mentioned, nor any other tax whatsoever was deducted or withheld by said plaintiffs from said dividend or the payment thereof to stockholders. Said earnings, income and gains accrued during the period from July 1st, 1870, to December 31st, 1870, inclusive.

That on the 16th day of December, 1870, the plaintiffs paid to the receiver of taxes of the city and county of New York, the sum of $26,720.40, as and for the taxes of the city, county and State of New York, all imposed by law upon the shares of the stock of the plaintiffs' bank, held by the stockholders thereof, which payment was made for the account and behalf of the stockholders of the plaintiffs, and which amount, unless so paid as taxes, would have been paid to stockholders as a part of said dividend declared on December 16th, 1870. Said taxes were paid with money taken from the undivided profits which accrued, and were earned during the period from July 1st to December 31st, 1870. That the assessor of Internal Revenue of the United States in and for the Thirty-second Collection District of the State of New York, did, on the 20th day of June, 1871, assess against the plaintiffs a tax of two and one-half per cent. on the several foregoing amounts of $123,076.92 and $26,720.40, the aggregate of which amounts of taxes so assessed was $3,591.09.

That on said June 20, 1871, and ever since that time, the defendant held, and now holds, the office of Collector of Internal Revenue of the United States in and for the Thirty-second Collection District of the State of New York, and then performed, and now performs, the duties of said office.

That on the 30th day of June, 1871, the defendant, as such collector, demanded from the plaintiffs the payment of said taxes so assessed as aforesaid, amounting to said sum of $3,591.09, and that on said June 30th, 1871, the plaintiffs were compelled to, and did under protest, pay said sum to the defendant as such collector, and the defendant received the same.

That on the 10th day of July, 1871, the plaintiffs, according to the provisions of law in that regard and the regulations of the secretary of the treasury in pursuance thereof, made an appeal to the commissioner of internal revenue from the aforesaid assessment and collection, in and by which appeal the plaintiffs demanded that the said sum of $3,591.09, so assessed and collected as aforesaid, should be refunded to the plaintiffs.

That on the 2d day of October, 1871, the said commissioner of internal revenue, decided said appeal adversely to said plaintiffs, and that this action was brought by the plaintiffs within six months from the date of said decision upon said appeal.

The claim of the plaintiffs is, that under the Act of July 14th, 1870 (U. S. Stat. at Large, vol. 16, p. 256), dividends of earnings, income or gains, which were declared by banks during the last five months of the year 1870, are not taxable.

The decision of the case depends upon the proper construction to be given to section 15 of said act (U. S. Stat. at Large, vol. 16, p. 260). The material portions of this section are as follows:

"That there shall be levied and collected for and during the year eighteen hundred and seventy-one, a

tax of two and one-half per centum on the amount of all interest or coupons paid on bonds, or other evidences of debt issued and payable in one or more years after date, by any of the corporations in this section, hereinafter enumerated, and on the amount of all dividends of earnings, income or gains, hereafter declared by any bank, trust company, savings institution, insurance company, railroad company, canal company, turnpike company, canal navigation company, and slack water company, whenever and wherever the same shall be payable, and to whatsoever person the same may be due, including non-residents, whether citizens or aliens, and on all undivided profits of any such corporation, which have accrued and been earned, and added to any surplus, contingent or other fund, and every such corporation having paid the tax as aforesaid, is hereby authorized to deduct and withhold from any payment on account of interest, coupons and dividends, an amount equal to the tax of two and one-half per centum on the same."

The controversy in regard to the true interpretation of this section arises upon the construction to be given to the clause "that there shall be levied and collected for and during the year 1871," in connection with the words "hereafter declared."

On the one part it is contended that the statute is to be construed as follows: "That there shall be levied and collected a tax of two and one-half per centum upon all dividends hereafter declared for and during the year 1871," that the words "for and during the year 1871," limit the tax to dividends declared upon the business of and during that year.

The construction of the defendants is "that the tax upon all dividends hereafter declared shall be levied and collected for and during the year 1871," and that these words refer to the time when the tax is levied, or assessed, and collected.

It is to be observed as stated by Judge Lowell of Massachusetts, in the decision of the Metropolitan

Railroad Company *v.* Chas. W. Slack, delivered May 1, 1874, but not yet reported, "that the words 'for and during the year 1871,' were inserted upon the report of a committee of conference, and without a word of debate in either house."

As the section stood before the insertion of these words, it is obvious that the meaning of this part of the statute was to impose a continuing tax of two and one-half per cent. upon all dividends thereafter declared, without limitation as to the duration of the tax.

The addition of the words "for and during the year 1871," creates the difficulty in determining the construction of the section as amended, for it is evident that these words were not inserted without an object, and if the object was to specify the time and to limit the period within which future dividends should be taxable, then the word "hereafter" is superfluous. If, on the other hand, "hereafter" is to retain the force which it had before the section was amended, the scope and meaning of the amendment is not apparent.

To aid in ascertaining the object and purpose of the words which were thus added, and the intent of the whole section, it may be useful to understand the condition of the congressional legislation upon the subject of taxes upon dividends prior to the passage of this act.

By the 119th section of the Act of June 30, 1864 (13 U. S. Stat. at Large, p. 283), as amended by the 13th section of the Act of March 2, 1867 (14 U. S. Stat. at Large, 480), it was provided that the duties on incomes should "be levied on the first day of March, and be due and payable on or before the 30th day of April in each year, until and including the year 1870, and no longer."

The annual income tax imposed by that act was five per cent. The 120th section of the same act (*ubi supra*, p. 283), as amended by the 9th section of the Act of July 13, 1866 (14 U. S. Stat. at Large, 138), provided that there should be levied and collected a duty of five

per centum per annum upon all dividends declared due to stockholders, as part of the earnings of the corporations therein specified, and such corporations were required to pay the duty to the proper officer, and to deduct and withhold the tax from the amount paid to stockholders on account of their dividends.

This dividend tax was, though a part of the general system established by Congress for the taxation of incomes, in form a tax upon the corporations, inasmuch as it was imposed directly upon the dividends, and payment was required of the corporation, which was also directed to make due returns of such dividends to the proper officer.

It was a tax in substance upon the shareholder, inasmuch as it was deducted from his dividends by the corporation, and as was held in Stockdale *v.* Atlantic Insurance Company (19 *Internal Revenue Record;* p. 169), "The effect of such a tax on the shareholder is the same, whether it be considered a tax on his share for the dividend earned by his share, or on the corporation on account of said earnings. And it is the same whether the tax is imposed on the undivided earnings, or on those earnings after they have been divided. He, in any and all these cases, in point of fact ultimately suffers to that extent or loses the amount of the tax."

But it was held by the law officers of the government that the limit upon the duration of the income tax, which was prescribed by the 119th section of the Act of June 30, 1864, as amended, did not apply to corporation taxes, and consequently payment of the tax upon dividends declared in 1870 was exacted prior to the passage of this act.

This, then, was the subject matter upon which Congress was called to legislate during the session at which the Act of July 14, 1870, was passed. The income tax for the year 1869 was due April 30, 1870, and the tax ceased thereafter. No income tax for the year 1870 had been imposed. The tax upon dividends was

still being collected from unwilling corporations. The Act of 1870 was "designed to recast the internal revenue laws, to repeal some taxes, modify others and declare the re-enactment or continuance of others for a limited time, and this was especially true of the class of taxes embraced under the general head of income taxes of all kinds." Stockdale *v.* Atlantic Insurance Company (19 *Int. Rev. Rec.*, 169).

The 17th section declared that the dividend tax of the Act of June 30, 1864, should not be levied or assessed after August 1, 1870.

The 6th section established an income tax of two and one-half per centum annually upon incomes for the years 1870 and 1871, and no longer. The dividend tax for the future was established by the 15th section.

The conclusion at which I have arrived from an examination of the statute, and the history of legislation on the subject, is that the 15th section made taxable those dividends which were declared for the earnings of the year 1871, and also those which were declared during that year, and limited the tax to those dividends only, and that the tax was to be imposed upon the dividends for that year, and also upon all dividends declared during the year 1871, and was thereafter to cease.

1st. Such a construction is manifest from a comparison of the language and intent of the 6th section of the Act of July 14th, 1870, with the language and apparent intent of the 15th section.

The text of the material part of the 6th section is as follows:

"That there shall be levied and collected annually, as hereinafter provided, for the years eighteen hundred and seventy and eighteen hundred and seventy-one, and no longer, a tax of two and one-half per centum upon the gains, profits and income of every person residing in the United States and of every citizen of the United States residing abroad derived from

any source whatever, whether within or without the United States, except as hereinafter provided."

The obvious meaning of this language is that there shall be collected a tax upon the income of every person for the years 1870 and 1871, and not thereafter. The tax is upon the income accruing in the specified year; no one has ever contended that the income tax for the years 1870 and 1871 was to be collected in those years respectively. The return of the tax-payer for each year ending December 31, were not made until the following March, and the payment of the tax was not made until the succeeding month. The tax upon the income of 1871 was collected April 30, 1872.

When the 15th section provided that there shall be levied and collected for and during the year 1871, a tax on the amount of dividends hereafter declared, as the 6th section specified the years during which taxable incomes were to accrue, the 15th section specified the particular year during which taxable dividends were to be earned, and each section provided a limitation of time, beyond which the respective taxes were not to be imposed.

The object of Congress was to determine not only the duration of these two prominent classes of taxes but also the years when or "for" which the assessable dividends and incomes were to accrue. The statute therefor continued the income tax for ten years at the reduced rate of two and one-half per cent. It declared how long the dividend tax should continue, by the words "during the year 1871," analagous to the "and no longer" of the 6th section. And it also specified the year in which the taxed dividends were to be earned by the word "for," the same word which was used in the 6th section with reference to the years during which incomes were to bear this burden.

But if the incomes of the entire years 1870 and 1871, were taxed, why was the dividend tax confined to the year 1871 and not extended to the dividends of the last five months of 1870?

The answer may be that there was a natural relation and connection between the two classes of taxes. Each practically upon the income of the citizen. A tax of two and a half per cent. was now imposed upon incomes of 1870 and 1871, but dividends had already paid, and were to pay until August 1st, 1870, a tax of five per cent.

Congress may have thought proper not to impose a tax directly upon corporations for the residue of the year, but that it should be continued thereafter at the same rate and for the same period with the tax upon incomes.

It may be claimed that the object of the words "for and during the year 1871" was simply to limit the time within which the dividend was to be declared; that the statute would then mean "there shall be a tax upon all dividends hereafter declared, and during or until the end of 1871." But such a construction would have invited an evasion of the tax, for if the limitation was simply one of time within which the dividends were to be declared, an easy method of avoiding the tax would have been to postpone the dividend. The word "for" is one of importance. It prevented any evasion by providing that a tax was to be paid upon all dividends declared "for"—that is, upon the earnings of 1871; and furthermore it specified the particular year whose dividends were taxable, in the same manner that the 6th section provided that the income tax was to be paid upon incomes for the years 1870 and 1871. The section, as thus construed, prevented any evasion either prior to or after the year 1871. Barnes *v.* The Railroad Co., 17 Wall., 294.

It is apparent from the opinion of the court in these cases that the words "during the year 1871" did not limit the taxability of dividends to those which were declared during that year. If they were earned during the year they were taxable whenever declared; and, in addition, all dividends which were in fact declared during the year were taxable. Thus all corporations which

either declared or earned dividends during the year 1871 were liable to pay a tax.

2d. The construction claimed by the defendant compels the collection of the taxes upon the dividends of 1871, as well as those of the last five months of 1870, within the year 1871—a construction which is in violation of the other provisions of the statute.

By the 16th section, the officers of the corporation declaring the dividend were required to make and render to the proper assessor a return of the dividend on or before the tenth day of the month following that in which it became due. No return of a dividend declared or payable in December, 1871, was required to be made until January, 1872. If declared in December, 1871, for the earnings of that year, but not payable till January, 1872, the return is not to be made till February, 1872.

The returns are sent to the collector within thirty days (sec. 18 act of June 30, 1864) (13 U. S. Stats. at Large, p. 328), and the taxes are collected within ten days thereafter. (Sec. 28, same act, *ubi supra*, p. 232). Thus the dividends payable in December, 1871, would not be collected before February, 1872.

It is hardly possible to suppose that the 15th section intended, in violation of the spirit of the 16th section, and of the other provisions of law, to require that the taxes upon all dividends of 1871 should be paid in that year, or that those dividends only of 1871 were taxable upon which a tax could legally be collected within the year. Neither is it to be supposed that it was the intention of Congress to postpone the payment of the taxes upon the dividends of 1870 to the succeeding year, when by the course of business and the requirements of law these taxes had always been paid within a period of about two months from the time of the payment of the dividends.

3d. This construction is in accordance with the

natural and ordinary meaning of the words of the section.

This point is stated by McKenna, Circuit Judge, in Philadelphia & Reading R. R. *v.* Kenney (18 Int. Rev. Record, p. 92), as follows:

"The word 'levied' in the beginning of the section is evidently employed as convertible with assessed or imposed, so that the import of the enactment is, that interest, dividends, and surplus earnings shall be subjected to a tax of two and one-half per cent. for and during the year 1871. The plainly expressed meaning of the section would therefore seem to be that the tax to be levied was a tax for the year 1871, and not for the whole or any part of any previous year, and it was to be imposed upon the enumerated subjects, during and within the year 1871, and not during or within any other year. Interpreting the words of the section, then, according to their ordinary sense, interest falling due, and dividends declared and payable within the last five months of 1870 were excluded from the operation of the tax."

It is noteworthy that the word "hereafter" is not employed in connection with the interest or coupons, which are also subject to tax. The object of using the word "hereafter" in connection with dividends only, was, as the section was at first drawn, to make it manifest that the two and one-half per cent. tax was not retroactive, but that dividends declared prior to August 1, 1870, were to pay the larger tax. When the words "for and during the year 1871" were added, it became plain that no retroactive operation of the statute was intended, and the word "hereafter" lost its peculiar force; and the year during which the dividends were to be earned became the main text of taxability. As tersely remarked by Judge Lowell, in Metropolitan R. R. Co. *v.* Slack, heretofore cited, "the point which in reality is the gist of the case is that it is not the decla-

ration of a dividend, but the earning of profits that is the material thing, and that it is upon the profits earned in 1871 that the tax is imposed, and on none other."

It seems to me that those dividends also which were declared in 1871 were taxable, although not declared exclusively from the earnings of that year.

If the word "hereafter" is to be the governing word of the section, then the clause inserted by the amendment of which I have spoken, becomes either repugnant to the word "hereafter," or else is to be construed in such a manner as to be self-contradictory, and inconsistent with the other provisions of the statute.

If, on the other hand, the clause "for and during the year 1871" is the governing clause, then the sections of the statute become harmonious, each with the other, and the word "hereafter," while losing any especial force, is not repugnant with the remainder of the section, but becomes merely needless.

The latter construction seems to me to be less violent and strained than the other, and to give each part of the section its due and weight, and also to be most in accordance with the general object of the statute and intent of the Legislature.

Inasmuch as the dividends of the plaintiffs were declared upon the earnings of the preceding six months, commencing July 1, 1870, and although the 17th section of the Act of July 14, 1870, repealed corporation taxes after August 1, 1870, inasmuch as all rights which had already accrued, or might accrve after July 14, 1870, were saved, it may be claimed that a five per cent. tax was due upon the earnings for one month prior to August 1. But no right had accrued or was accruing to tax a dividend until it was declared, or to tax undistributed earnings until they had been added to the surplus, unless such declaration or addition was "omitted or neglected for more than six months." It was the fund which accrued within the six months which Congress intended to tax (Barnes *v.* The Railroad

Company, 17 Wall., 309). At the time when that fund accrued, the tax had been repealed.

Let the judgment be entered for the amount of taxes paid upon the dividends, and surplus earnings specified in the statement of facts, with interest from the dates of payment.

FRANCIS C. BARLOW,
For Plaintiff.

GEORGE BLISS,
U. S. Attorney,
For Defendant.

NATIONAL CITY BANK

vs.

MARSHAL B. BLAKE.

SHIPMAN, J.: In this case a dividend was declared in October, 1870, payable on November 1, 1870, and on the last mentioned date an addition was made to the surplus of the bank.

This dividend and amount of surplus, it has already been decided in the National Park Bank case, were not subject to tax under the 15th section of the Act of July 14, 1870.

It was not claimed at the trial that they were taxable under the sections of the Act of July 30, 1864, which were repealed from and after August 1, 1870, by the 17th section of said act, and which previous section imposed a five per cent. tax.

The said bank also declared a dividend in April, 1871, payable on May 1, 1871, and added an amount to surplus on the latter date, upon which two latter amounts a tax was collected.

It is not claimed that these two amounts were exempt from taxation.

The views of the court upon the questions of law are fully given in the opinion filed in the Park Bank case.

Let judgment be entered for the plaintiffs for the amount of the taxes paid upon the dividend of October, 1870, and surplus of November 1, 1870, with interest from the respective payments.

FOURTH NATIONAL BANK

vs.

MARSHAL B. BLAKE.

SHIPMAN, J.: This case involves the same state of facts and the same questions of law which have been considered in the case of the National Park Bank of New York *vs.* Marshal B. Blake.

It differs from the Park Bank case in this that a tax was also assessed and paid upon the amount of the undivided profits of the plaintiff's bank, added to their surplus on December 30, 1870. Said undivided profits accrued during the period from July 1, 1870, to December 31, 1870, inclusive.

The questions as to taxability of surplus which was added, and dividends which were declared after August 1, 1870, depended upon the same consideration.

As I have given my views fully in the opinion already filed in the Park Bank case, it is not necessary to repeat them here.

Let judgment be entered for the plaintiffs for the amount of the tax paid on dividends and surplus as stated in the finding of facts, with interest from the date of payment.

Shchedule C.

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

In Equity.

October Term, 1873, to wit, May 1, 1874.

METROPOLITAN RAILROAD COMPANY
vs.
CHARLES W. SLACK.

Opinion of the Court.

LOWELL, J.:—The reasoning of the Supreme Court in Barnes *v.* Several Railroad Companies, 17 Int. Rev. Rec., 82 and 84, seems to me to govern the first part of this case relating to the tax assessed upon the plaintiffs for the dividend declared in June, 1870. In those cases it was laid down that the tax upon the earnings of such companies as the plaintiff's is an excise imposed upon them directly, and not a part of the general income tax of their shareholders. It seems to follow, fairly, that the limitation of section 119 of the Act of 1864, as amended by the Act of 1866, 14 Stats., 138, which brought the income tax to a close with the end of the year 1869, does not apply to this excise. This part of the case I decide for the defendant.

The question concerning the tax on the earnings of the second half of the year 1870 is one of difficulty, because section 15 of the Act of 14th July, 1870, 16 Stats., 260, appears to be self-contradictory. It provides that there shall be levied and collected "for and during the year 1871" a tax of two and a half per cent. on the amount of all interest or coupons paid, &c.,

and on the amount of all dividends of earnings, income or gains "hereafter declared" by any bank, etc. I have taken pains to examine the records of Congress, and find that the words "for and during the year 1871" were inserted upon the report of a committee of conference, and without a word of debate in either House.

As the section stood before those words were added, the meaning was that instead of the former tax of five per cent., there should be levied a lighter tax, but that this should not be retroactive so as to relieve dividends which had been or should be declared before the passage of the act, and thus became liable to the five per cent.

When the words "for and during the year 1871" were added, the "hereafter declared" became almost meaningless or else repugnant; and if the latter, the question is, which is to control?

The commissioner of internal revenue decided first that dividends for the last half of 1870 were liable to be assessed (12 Int. Rev. Rec., 93, 117), then that they were not (13 *Id.*, 17), and then again that they were (14 *Id.*, 57); and it is not surprising that there should be this conflict of opinion.

I cannot find any way of fully reconciling the apparent inconsistency. It is not, in my opinion, possible so to change the words "for and during the year 1871" as to hold that they authorize an assessment for 1870. I think "during" is intended to express the idea that after 1871 there shall be no further excise of this character, and not, as was argued by the defendant, that the levy must actually be made in that year, of all the profits of that year, and also of those of the last half of 1870.

In my opinion, a levy made in 1872 for the earnings of 1871 would be valid, and was intended to be made it necessary; in other words, the tax was upon the whole profits of 1871, and could not be evaded by declaring, out of those profits, a dividend payable in

1872; and this I understand to be the decision under the Act of 1866, in *Barnes* v. *The Railroad Companies*, above cited.

If this be so, what warrant have we for saying that a tax to be levied for the year 1871 means for eighteen months? If the latter half of 1871 is included in one year, how can the latter half of 1870 be included in the same year? There is no reason for any such provision; and it is contradicted by section 16, which requires a return to be made to the assessor within thirty days after the dividend is declared. The construction contended for by the defendants requires us to hold that a dividend payable in August is to be returned in September, though it is not taxable until the following January.

That Congress understood full well the meaning of the words used in the opening clause of section 15 is shown by an amendment inserted, if I mistake not, at the same time and in the same way in section 6, namely, that the income tax should be levied and collected for the years 1870 and 1871, and no longer. The "during" of section 15, corresponds, as I have said, to the "no longer" of section 6; and the unmistakable meaning of the early part of section 15, is that the tax on the dividends of railroad companies shall be levied for the year 1871 and no longer.

So far, I do not find the difficulty, but this brings the two phrases into direct repugnancy, because "hereafter declared" seems to mean at any time after the passage of the act.

Upon the whole, I think the governing clause of this section is the opening clause, because if that is rejected, there is no power left to levy any tax. It is equally improper to reject any part of that clause, because then there is no limitation of years at all. That part of the section must, therefore, be entirely changed by interpolating the words "for the remainder of the year 1870, &c.," for etc., or something equivalent, or else it is plain that Congress have failed to authorize a levy

for the last months of 1870, whatever they may say about *dividends* in some other clause. Now, I know of no authority which will authorize such an interpolation; it seems to me much more consistent as the sound construction, to reject the words "hereafter declared," or to make them yield a part of their meaning and remain as surplusage, or nearly so, because all the dividends earned in 1871 would be declared after the passage of the act, while all the dividends thereafter declared can by no means be assessed for the year 1871. Indeed, to give to those words the force contended for, is to change and enlarge their sense into nearly the opposite of their original meaning. When written, they meant that the reduction of the tax should not be retrospective. As now proposed they would mean that it shall not be too prospective. I cannot believe that it is permissible to supply a meaning for an Act of Congress upon anything of what they probably might be expected to intend, which would so twist this section as to read, that on all dividends hereafter declared until the end of 1871, including all earned in 1871, there should be levied the tax. I come back therefore, to the point which is in reality the gist of the case, that it is not the declaration of a dividend, but the earning of profits that is the material thing, and that it is upon the profits earned in 1871 that the tax is imposed and on none other.

I have found my judgment enlightened and my opinion fortified by the decision and reasoning of McKenna, J., in the Philadelphia & Reading R. R. Co. *v.* Kinney, 18 Int. Rev. Rec., 92, which sustains this construction of the statute.

Judgment for plaintiff for the amount of the second sum mentioned in the agreed facts, viz., $2,036.30, with interest at six per cent. from 31st July, 1871.